



June 15, 2016

Filed via <http://comments.cftc.gov>

Christopher Kirkpatrick
Secretary
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: **Notice of Proposed Amendment to Final Order Exempting Specified RTO/ISO Transactions, 81 Fed. Reg. 30245 (May 16, 2016)**

Dear Secretary Kirkpatrick:

The PSEG Companies¹ hereby respectfully submit these comments to the Commodity Futures Trading Commission's ("CFTC" or "Commission") notice of proposed order and request for comment concerning the Commission's proposal ("Proposal")² to amend an order issued in March 2013 to the Midcontinent Independent Transmission System Operator, Inc., ISO New England, Inc., PJM Interconnection, L.L.C., California Independent System Operation Corporation, New York Independent System Operator, Inc., and the Electric Reliability Council of Texas, Inc. (collectively, "RTOs/ISOs").³ Specifically, the Commission proposes to amend the 2013 Order to permit third party actions in federal district court under certain sections of the

¹ For the purposes of these comments, the PSEG Companies consist of Public Service Electric and Gas Company ("PSE&G"), PSEG Power LLC ("PSEG Power") and PSEG Energy Resources & Trade LLC ("PSEG ER&T").

² *Notice of Proposed Amendment to and Request for Comment on the Final Order in Response to a Petition From Certain Independent System Operators and Regional Transmission Organizations To Exempt Specified Transactions Authorized by a Tariff or Protocol Approved by the Federal Energy Regulatory Commission or the Public Utility Commission of Texas From Certain Provisions of the Commodity Exchange Act Pursuant to the Authority Provided in the Act*, 81 Fed. Reg. 30245 (May 16, 2016).

³ Final Order in Response to a Petition From Certain Independent System Operators and Regional Transmission Organizations to Exempt Specified Transactions Authorized by a Tariff or Protocol Approved by the Federal Energy Regulatory Commission or the Public Utility Commission of Texas From Certain Provisions of the Commodity Exchange Act Pursuant to the Authority Provided in the Act, 78 FR 19880, Apr. 2, 2013 (published April 2, 2013) ("2013 Order").

Commodity Exchange Act (“CEA”) that the Commission previously exempted from application to specified RTO/ISO transactions.

The PSEG Companies respectfully oppose the Proposal and request that the Commission determine that adoption of the Proposal is not in the public interest. In addition, the PSEG Companies assisted in the preparation of the comments filed contemporaneously by The Electric Power Supply Association (“EPSA”), a trade association in which PSEG ER&T is a member. The PSEG Companies generally support EPSA’s comments and strongly urge the Commission to consider the recommendations contained therein.

The PSEG Companies participate in the physical commodity markets and rely on commodity derivative contracts in order to hedge or mitigate commercial risks associated with electric operations. PSE&G is a public utility company organized under the laws of the State of New Jersey and is presently engaged in, among other things, the transmission and distribution of electricity and the distribution of natural gas in New Jersey. PSEG Power is a wholesale energy supply company that integrates its generation asset operations with its wholesale energy, fuel supply, energy trading and marketing, and risk management functions through three principal subsidiaries. PSEG ER&T sells power and certain ancillary services at market-based rates. PSEG ER&T is engaged in extensive asset-based energy trading operations throughout the Northeast.

The PSEG Companies are members of a number of the RTOs/ISOs that will be impacted by the Proposal. These RTOs/ISOs are charged with the responsibility of managing the electric grid and ensuring that there is a sufficient amount of electric capacity within the particular RTO/ISO’s system to provide reliable electricity to its consumers. RTO/ISO operations and market rules are extremely complex and reflect a careful balancing of interests among many competing goals and industry participants. The RTOs/ISOs operate under the oversight and close supervision of the Federal Energy Regulatory Commission (“FERC”) which has a number of enforcement tools to ensure that the integrity of the RTO/ISO markets is maintained and market participants are not intentionally engaging in behavior that negatively impacts their efficient operation. In addition, interested parties have the opportunity to seek changes to existing RTO/ISO tariffs by filing at FERC or through RTO/ISO stakeholder procedures which allow input from participants from all sectors of the industry. These existing processes provide interested parties with many opportunities to have their concerns addressed by bodies with expertise in this area and that have the ability to weigh the impacts of competing interests. Allowing private parties to attack the market design structures through federal litigation would significantly undermine these existing processes to develop and refine the RTO/ISO markets.

The *Aspire* case⁴ provides a clear example of this potential disruption. This suit concerned a challenge to a rule adopted by the Electric Reliability Council of Texas (“ERCOT”) which is administered by the Public Utility Commission of Texas (“PUCT”).

⁴ *Aspire Commodities LP v. GDF SUEZ Energy North America, Inc.*, No. 4:14-cv-01111, Dkt. No. 10 (S.D. Tex. Filed April 22, 2014).

Specifically, the plaintiffs in *Aspire* originally filed a petition at the PUCT requesting that it revoke the “small fish rule” that permits power generators in ERCOT that had been found by the PUCT to not have market power to offer to sell their physical electricity in an approved manner into the ERCOT market.⁵ This rule is a cornerstone of the ERCOT energy market design and, if eliminated, would have required extensive revisions to the ERCOT energy market structure.

The PUCT initiated a proceeding at *Aspire*’s request. All those that provided comments in that proceeding spoke in favor of retaining the rule.⁶ The PUCT issued an order keeping the rule in effect.⁷ Not satisfied with a full regulatory proceeding before the PUCT, *Aspire* brought a claim in federal district court against a generator that offered the energy produced at its plants in accordance with the applicable PUCT rule.⁸ The court, largely relying upon the RTO Order, dismissed the case.⁹ *Aspire* appealed to the U.S. Court of Appeals for the Fifth Circuit, which upheld the district court and denied rehearing.¹⁰ *Aspire* thus had ample opportunity for its concerns to be addressed in the PUCT proceeding and the appeals taken from that proceeding. Moreover, had *Aspire* been successful in its district court case and if that court had been determined to have jurisdiction, ERCOT would have presumably then been required to revamp its existing market structures which could have been expected to have caused tremendous disruption of energy markets in Texas. In addition, while the district court wisely relied upon the RTO order, it clearly lacked the ability to consider all the impacts of a decision to eliminate the “small fish rule” much less to consider the value (and shortcomings) of any alternative market structures. Further, had *Aspire* been successful, future ERCOT stakeholder efforts would be chilled if market participants perceived that years of meticulous give-and-take efforts among highly knowledgeable market experts could be undone in this manner. In this scenario, additional market disruption could occur if market participants become unwilling to engage in activities that comply with the “small fish rule” because it is the subject of a claim in federal district court.

⁵ PUCT Docket No. 31972-78, Order Adopting Amendment to §25.502, New §25.504 and New §25.505 as Approved at the August 10, 2006, Open Meeting (August 23, 2006).

⁶ PUCT Docket No. 42424-4, Initial Comments of Texas Competitive Power Advocates (May 23, 2014); PUCT Docket No. 42424-5, Comments of GDF SUEZ Regarding P.U.C. Subst. R. 25.504(c) (May 23, 2014); PUCT Docket No. 42424-6, South Texas Electric Cooperative, Inc.’s Comments (May 23, 2014); PUCT Docket No. 42424-7, Texas Industrial Energy Consumer’s Comments on Petition for Rulemaking to Eliminate P.U.C. Subst. R. 25.504(c) (May 23, 2014); PUCT Docket No. 42424-8, Luminant’s Initial Comments Regarding Raiden’s Petition for Rulemaking (May 23, 2014).

⁷ PUCT Docket No. 42424-11, Order Denying Petition for Rulemaking (June 20, 2014).

⁸ *Aspire Commodities LP v. GDF SUEZ Energy North America, Inc.*, No. 4:14-cv-01111, Dkt. No. 10 (S.D. Tex. Filed April 22, 2014).

⁹ *Aspire Commodities, L.P. v. GDF Suez Energy N. Am., Inc.*, No. H-14-1111, 2015 WL 500482 (S.D. Tex. Feb. 3, 2015).

¹⁰ *Aspire Commodities LP v. GDF SUEZ Energy North America Inc.*, ---Fed. App’x---, No. 15-20125, 2016 WL 758689 (5th Cir. Feb. 25, 2016).

Since issuance of the 2013 Order, the PSEG Companies have been operating with the understanding that the transactions specifically identified in the 2013 Order were only subject to FERC and RTO/ISO oversight and would not be subject to all of the provisions of the CEA (only the sections specifically reserved). Importantly, we have relied on the 2013 Order's finding that certain transactions would be exempt from the CEA when basing our investment determinations and decisions to procure energy needed to serve our customers exclusively on the FERC approved RTO/ISO Tariff provisions. The instant Proposal undermines the regulatory certainty we thought we gained with the 2013 Order and creates a new regulatory risk that these decisions, among many others, may be ultimately challenged by private parties in federal courts in an action brought under the CEA. This outcome only intensifies the regulatory confusion between CFTC and FERC jurisdiction and enhances litigation risks which may ultimately be borne by consumers.

Finally, if the Commission amends the 2013 Order to allow private rights of action from potentially thousands of allegedly aggrieved parties, it would add tremendous uncertainty to participants operating in the RTO/ISO markets and increase the costs of operating in those markets, especially if RTO/ISO participants are required to defend against numerous private-party litigants. For these reasons, the PSEG Companies respectfully request that the Commission withdraw the proposal to amend the 2013 Order to allow for third party causes of action.

Respectfully submitted,

Cara Lewis

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cc: Honorable Timothy Massad, Chairman
Honorable Sharon Bowen, Commissioner
Honorable Christopher Giancarlo, Commissioner
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